

For Immediate Release  
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## **FACT SHEET**

# **Proposed Guidance and Regulations Implementing the Fair Pay and Safe Workplaces Executive Order**

While the vast majority of federal contractors play by the rules, every year tens of thousands of American workers are denied overtime wages, are unlawfully discriminated against in hiring or pay, have their health and safety put at risk by federal contractors that cut corners, or are otherwise denied basic workplace protections. Taxpayer dollars should not reward companies that break the law, and contractors who meet their legal responsibilities should not have to compete with those who do not.

On July 31, 2014, President Obama signed the [Fair Pay and Safe Workplaces Executive Order](#), which will require prospective federal contractors to disclose labor law violations and will give agencies more guidance on how to consider labor violations when awarding federal contracts.

The Executive Order also ensures that contractors' employees are given the necessary information each pay period to verify the accuracy of their paycheck, and that workers who may have been sexually assaulted or had their civil rights violated get their day in court by putting an end to pre-dispute arbitration agreements covering these claims at corporations with large federal contracts, except where valid contracts already exist.

Today the Administration is issuing proposed regulations and guidance that would implement the Executive Order. The Department of Labor (DOL) and the Federal Acquisition Regulatory Council (FAR Council) developed the proposed guidance and proposed regulations after extensive outreach to stakeholders. This outreach included formal listening sessions with contractors, contractor organizations, worker advocates, and other stakeholders.

The proposed regulations and guidance make sure that agencies have the information they need to determine which contractors are providing their workers with basic protections. It also creates a process for agencies and DOL to help contractors come into compliance with labor laws. DOL will be setting up an office to help contractors and subcontractors understand their responsibilities under the Executive Order and comply with relevant law, and contracting agencies will have Agency Labor Compliance Advisors to assist contracting officers with reviewing and making determinations about disclosed labor violations, as well as helping contractors take steps to come into compliance.

In implementing the Executive Order, DOL and the FAR Council have made every effort to streamline the disclosure process and minimize the burden on contractors. The processes set forth in the proposed guidance and proposed regulations build on the existing federal acquisition system with which contractors are familiar. Given that most contractors follow the law, they will only attest that they are meeting their responsibilities. Moreover, contracting officers will focus on the most egregious violations; for those contractors with such egregious violations, DOL and agencies will work with them to try to address any issues that can be remedied to bring them into compliance. Parts of the proposed regulations are being phased in, so contractors have more time to fully understand their responsibilities, and the proposed regulations also have proposed alternative procedures to reduce the burden on contractors even further.

Further information on the proposed guidance and proposed regulations can be found below.

Both DOL's proposed guidance and the FAR Council's proposed regulations will be available for public review at <https://www.federalregister.gov/public-inspection>, and they will be published in the Federal Register shortly thereafter, followed by a 60-day period for public comment.

# ADDITIONAL INFORMATION ON REDUCING CONTRACTOR BURDEN

DOL and the FAR Council have made every effort to streamline the disclosure process and minimize the burden on contractors:

**The processes set forth in the proposed guidance and proposed regulations build on the existing federal acquisition system with which contractors are familiar.** Federal contracting officers already must assess a contractor's record of integrity; however, there currently is no way for them to access comprehensive information about companies' workplace violations. The proposed regulations and guidance make sure that contracting officers have the necessary information to make informed decisions, and provide greater transparency for contractors as to the information that will be considered in making that determination.

**The vast majority of federal contractors will only have to attest that they comply with laws providing basic workplace protections.** The proposed guidance and proposed rule direct contracting officers to consider only the most egregious violations. It is estimated that less than 5 percent of covered contractors and subcontractors will have labor violations involving enforcement-agency action that require disclosure. (Although this figure does not include violations resulting in judgments or awards stemming from private litigation or arbitration proceedings that do not involve enforcement agencies, the overall percentage of the contractor population that will be required to take action beyond attesting will still be very small.) Of this percentage, only an offeror that is being considered for award will be required to disclose details and only a small portion of those will have serious, willful, repeated, or pervasive violations that require further action.

**There will be designated agency personnel who will help contractors understand their responsibilities and come into compliance.** DOL will be setting up an office to help contractors and subcontractors understand their responsibilities under the Executive Order and comply with relevant law. DOL will also work with Labor Compliance Advisors (who each agency will designate or hire as required by the Order) across contracting agencies to ensure efficient, accurate, and consistent decisions across the government.

**Parts of the rule will be phased in over time.** Contractors will not be required to disclose violations related to equivalent State laws immediately, significantly reducing the number of violations they will need to report. And the requirements that subcontractors disclose their violations will also be phased in, so that contractors have an opportunity to better understand the process before they undertake a similar one with respect to their subcontractors.

**The proposed rule contains further proposals to reduce burdens.** Most notably, it provides an alternative process for subcontractors to provide DOL with their violations, rather than their contractor. The contractor could then rely on DOL's review of the subcontractor's violations in determining whether the subcontractor is responsible.

# ADDITIONAL INFORMATION ON THE PROPOSED DOL GUIDANCE

Under the Executive Order, covered contractors and subcontractors will be required to disclose any administrative merits determinations, civil judgments, or arbitral awards or decisions issued within the preceding three years finding that they have violated one or more of the labor laws identified in the Executive Order. As directed by the Executive Order, the proposed guidance defines the determinations, judgments, awards and decisions that must be disclosed. The proposed guidance also defines which labor law violations are considered serious, willful, repeated or pervasive, using existing statutory definitions where available, and provides guidance on considering mitigating factors and weighing the severity of contractors' violations. Finally, the proposed guidance provides direction on implementing the Executive Order's paycheck transparency requirements. Each of these core provisions is summarized below.

## Types of decisions:

1. **Administrative Merits Determinations:** In order to provide clarity regarding the violations that covered contractors and subcontractors must disclose, the proposed guidance provides a complete list of documents issued by each of the relevant enforcement agencies that constitute administrative merits determinations. Each of these is a written document issued to employers following an investigation by the relevant enforcement agency—such as DOL's Wage and Hour Division, Occupational Safety and Health Administration, or Office of Federal Contract Compliance Programs; the National Labor Relations Board; or the Equal Employment Opportunity Commission—and a finding by the enforcement agency that one of the labor laws identified in the Executive Order has been violated.
2. **Civil Judgments:** These include any judgment or order issued by a court finding that an employer has violated one or more of the covered labor laws, or enjoining the employer from violating one or more of those laws.
3. **Arbitral Awards or Decisions:** These include any award or decision by an arbitrator or arbitral panel finding that an employer has violated one of the covered labor laws, or enjoining the employer from violating one or more of those laws.

## Types of Violations:

1. **Serious:** The proposed guidance incorporates the Occupational Safety and Health Act's definition of "serious," and for the remaining labor laws defines the elements that make a violation serious. In doing so, the proposed guidance considers factors such as the portion of employees affected; the degree of risk posed or actual harm done by the violation to the health, safety or well-being of a worker; and the amount of damages incurred or penalties assessed.

2. **Willful:** For the Fair Labor Standards Act, the Occupational Safety and Health Act, and several anti-discrimination laws, there are existing standards for determining whether violations are “willful,” and the proposed guidance adopts those existing standards for purposes of those statutes. For each of the remaining statutes, a violation is willful if the employer knew that its conduct was prohibited by one or more of the covered labor laws, or showed reckless disregard for, or acted with plain indifference to, whether the covered labor laws prohibited its conduct.
3. **Repeated:** “Repeated” violations are two or more labor law violations within the preceding three years that are the same or substantially similar. Whether violations are substantially similar turns on the nature of both the violations themselves and the underlying legal obligations.
4. **Pervasive:** “Pervasive” violations are the most severe. Violations are pervasive if they reflect a basic disregard by the employer for the covered labor laws, as demonstrated by a pattern of violations, continuing violations or numerous violations. Among the factors to be considered in determining whether violations are pervasive are the size of the contractor relative to the number of violations and the extent of higher-level management’s involvement.

#### **Weighing Violations and Mitigating Factors:**

The proposed guidance provides direction on weighing the relative severity of violations. For example, pervasive violations, violations falling into two or more of the four categories, and violations of particular gravity (such as terminating employees in retaliation for exercising their rights under the covered labor laws, or violations related to an employee’s death) should be given the most weight. The proposed guidance also addresses mitigating factors to consider when weighing violations, including good faith efforts to remedy past violations, internal processes for expeditiously and fairly addressing reports of violations, and/or plans to proactively prevent future violations.

#### **Paycheck Transparency:**

The Executive Order requires covered contractors and subcontractors to provide wage statements to covered workers, giving them information concerning their hours worked, overtime hours, pay, and any additions to or deductions made from their pay. The Executive Order also requires covered contractors and subcontractors to provide to workers whom they treat as independent contractors a document informing them of their independent contractor status. The proposed guidance provides direction on implementing these paycheck transparency requirements. The proposed guidance also sets out two approaches to identifying states with substantially similar wage statement requirements—compliance with which will satisfy the Executive Order’s wage statement requirement—and specifically requests public comment on the two options.

## **Equivalent State Laws:**

The Executive Order provides that contractors and subcontractors will also be required to disclose violations of state labor laws equivalent to the 14 federal labor laws identified in the Order, and directs DOL to provide guidance as to which state laws are equivalent. This requirement will be phased in at a later time, with the exception of OSHA-approved state plans, which are included in the current proposed guidance and regulations. DOL will issue a second round of proposed guidance defining the remainder of the equivalent state laws, and the FAR Council will issue a second set of regulations to implement this portion of the Executive Order's disclosure requirements.

The proposed guidance provides more detailed direction on each of these topics, including appendices with illustrative examples for ease of understanding. [The text of the proposed guidance can be accessed here.](#)

# ADDITIONAL INFORMATION ON THE PROPOSED FAR RULE

As directed by the Executive Order, the proposed FAR regulations build on the DOL guidance and existing federal procurement policies and practices and include the following provisions:

1. **Initial Representation:** When bidding on federal procurement contracts covered by the Executive Order, prospective contractors will only attest whether they have or have not had violations of the covered labor laws resulting in administrative merits determinations, civil judgments or arbitral awards or decisions—as defined in the DOL guidance—within the last three years.
2. **Disclosure of Additional Information:** Only if a prospective contractor becomes a finalist for the award—and a contracting officer therefore undertakes a responsibility determination regarding the prospective contractor—will it have to disclose additional information about its labor violations (unless the contractor has already submitted such information for another bid and nothing has changed since then). At the same time, the prospective contractor will have the opportunity to provide additional information as it deems necessary to demonstrate its responsibility, such as mitigating circumstances, remedial measures and other steps taken to achieve compliance with the relevant labor law(s).
3. **Evaluation by Contracting Officer:** With the advice and assistance of the contracting agency’s Labor Compliance Advisor and, where necessary, DOL, contracting officers will determine whether a prospective contractor’s labor violations implicate its integrity and business ethics and whether additional action is needed. If necessary, such action may include a labor compliance agreement with the relevant enforcement agency or agencies, denial of the award, or referral to the agency’s suspending and debarring official.
4. **Subcontractor Disclosure:** The Executive Order and the proposed FAR regulations provide that contractors will require their prospective subcontractors on subcontracts valued at greater than \$500,000 to disclose information regarding their violations of the covered labor laws. Contractors are already required to evaluate the responsibility of their prospective subcontractors, and they will consider the disclosed labor violations—using DOL’s guidance—in the course of making these responsibility determinations. The proposed FAR regulation also seeks comment on ways to ensure that the subcontractor responsibility determination process is clear and manageable for prime contractors. One alternative being considered would allow the contractor to direct the subcontractor to consult with DOL on its violations and remedial actions and report back to the prime contractor on DOL’s response. The Executive Order’s subcontractor disclosure requirements are expected to be phased in through a delayed implementation in order to give the contracting



community time to become familiar with the proposed regulations' disclosure processes and the information provided in DOL's guidance.

5. **Paycheck Transparency Requirements:** The proposed FAR regulations implement the Executive Order's requirements that covered contractors and subcontractors give their workers wage statements (i.e., information concerning hours worked, overtime hours, pay, and any additions to or deductions made from their pay) and, for workers who are treated as independent contractors, notices informing them of their independent contractor status. These requirements will help workers ensure they are getting paid what they are legally owed.
6. **Giving Workers Their Day in Court:** The Executive Order and proposed FAR regulations prohibit companies with federal contracts of \$1 million or more from requiring their workers to enter into predispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act, or from torts related to sexual assault or harassment, except where valid contracts already exist.

[The text of the proposed FAR regulations can be accessed here.](#)